

## Federal Communications Commission

DA 99-1227

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In re Applications of	)	CC Docket No. 91-142
	)	
BRAVO CELLULAR	)	
	)	File No. 10673-CL-P-579-A-89
For Facilities in the Domestic Public Cellular	)	
Telecommunications Radio Service on	)	
Frequency Block A, in Market 579	)	
North Carolina 15 - Cabarrus	)	
	)	
CENTAUR PARTNERSHIP	)	File No. 10720-CL-P-631-A-89
	)	
For Facilities in the Domestic Public Cellular	)	
Telecommunications Radio Service on	)	
Frequency Block A, in Market 631	)	
South Carolina 7 - Calhoun	)	
	)	
EJM CELLULAR PARTNERS	)	File No. 10116-CL-P-721-A-89
	)	
For Facilities in the Domestic Public Cellular	)	
Telecommunications Radio Service on	)	
Frequency Block A, in Market 721	)	
Wyoming 4 - Niobara	)	
	)	
EJM CELLULAR PARTNERS	)	File No. 10567-CL-P-596-A-89
	)	
For Facilities in the Domestic Public Cellular	)	
Telecommunications Radio Service on	)	
Frequency Block A, in Market 596,	)	
Oklahoma 1 - Cimarron	)	

**ORDER**

**Adopted: June 24, 1999**

**Released: June 24, 1999**

By the Deputy Chief, Commercial Wireless Division, Wireless Telecommunications Bureau:

**I. Introduction**

1. On October 21, 1997, the Wireless Telecommunications Bureau ("the Bureau") granted authorizations to EJM Cellular Partners ("EJM") for Market 721, Wyoming - Niobara and Market 596, Oklahoma 1 - Cimarron. On November 6, 1997, the Bureau granted authorization to Bravo Cellular ("Bravo") for Market 579, North Carolina 15 - Cabarrus. On January 7, 1998, the Bureau granted authorization to Centaur Partnership ("Centaur") for Market 632, South Carolina 7 - Calhoun. The Bureau granted each of these authorizations following the recipient's success in Commission-sponsored lotteries in the late 1980s.

2. In this order we address a Request for Rescission of these authorizations, filed on May 6, 1998

by Castle Trust, Orbit Cellular, RSA Cellular Partners, Schuylkill Mobile Fone, Inc., B. Scott Reardon III, Skyline Cellular Partners, Sunrise Trust, and Walker Trust ("Petitioners"). We also address a Petition for Reconsideration filed on December 28, 1998 by Petitioners and Turnpike Cellular Partners ("Pending Petitioners"). Also before us is a Motion to Strike So-Called Statement for the Record filed on July 22, 1998 by the above applicants.<sup>1</sup> All of the parties to this proceeding were applicants for the above markets.

## II. Background

3. Bravo, Centaur, and EJM were among a group of cellular applicants whose applications were designated for an evidentiary hearing in May, 1991 to determine if they had participated in an improper risk sharing scheme.<sup>2</sup> After a protracted hearing and appeal process, the Commission concluded that no improper risk sharing had occurred.<sup>3</sup> Finding that the applications "filed by EJM, Centaur and Bravo cannot be granted on the record before us,"<sup>4</sup> however, the Commission remanded the above four applications to the Bureau so that the applicants could file additional ownership information. The Commission further instructed the Bureau to give those applications expedited consideration. The Bureau obtained the required information and issued authorizations to Bravo, Centaur and EJM.<sup>5</sup> The authorizations indicate that the Bureau granted the applications on June 3, 1997.

4. Petitioners, who had filed applications in the above markets, sought review of the Commission's *Algreg* decision in the United States Court of Appeals for the D.C. Circuit. The Court dismissed the appeal because petitioners had not participated in the administrative proceedings regarding the alleged risk sharing scheme.<sup>6</sup> On or about April 9, 1998, Petitioners discovered that the Bureau had issued Radio Station Authorizations to Bravo, Centaur and EJM, all bearing grant dates of June 3, 1997.<sup>7</sup> Following this discovery, Petitioners filed their request to rescind the authorizations.

## III. Discussion

5. Petitioners argue that the Commission's June 3, 1997 Order did not grant the four applications and that the Order specifically stated that they were not grantable on the then state of the record.<sup>8</sup> They note that the Commission told the D.C. Circuit that Petitioners would be permitted to participate in any auction

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<sup>1</sup> In their Statement for the Record, Petitioners sought "to advise the Commission and all other parties in those markets [for which they initially filed applications] that . . . Petitioners have elected to participate in the still-pending proceedings before the Commission by joining in and adopting (by incorporation herein) the issues as set forth in the two petitions for reconsideration already pending." Petitioners's Statement for the Record at 7.

<sup>2</sup> *Algreg Cellular Engineering*, 6 FCC Rcd 2921 (CCB 1991).

<sup>3</sup> *Algreg Cellular Engineering*, 12 FCC Rcd 8148 (1997) ("*Algreg*").

<sup>4</sup> *Id.* at 8152, ¶ 1.

<sup>5</sup> Request for Rescission of Authorizations ("Request") at 2.

<sup>6</sup> *Turnpike Cellular Partners v. FCC*, No. 97-1421 (D.C. Cir. Dec. 16, 1997).

<sup>7</sup> Request at 2.

<sup>8</sup> *Id.* at 3.

the Commission might ultimately hold if the court reversed the Commission's decision in *Algreg*. Petitioners complain that the Bureau's action, if permitted to stand, will effectively dismiss their competing applications.<sup>9</sup> They observe that certain filings by the applicants claiming that *Algreg* granted their applications may have confused the Bureau and caused it to believe that the June 3 Order granted the application and permitted issuance of the authorizations.<sup>10</sup> Finally, Petitioners state that the Commission must rule on two pending petitions for reconsideration before it can grant the four applications.<sup>11</sup>

6. Centaur and EJM filed an opposition to the request on May 19, 1998. First, they asked the Commission to issue public notices of the grants.<sup>12</sup> Turning to the merits, they claimed that Petitioners lacked standing. Centaur and EJM noted that Petitioners failed to intervene in the hearing proceeding to determine if an improper risk sharing had occurred, did not file timely petitions to deny after applicants were announced as the lottery winners, and did not seek reconsideration of *Algreg*. Instead, they went directly to court and had their appeal dismissed for failure to participate in the administrative proceedings. Centaur and EJM conclude that because the Commission has told the D.C. Circuit that all other participants in the initial lottery would be eligible to participate in an auction should *Algreg* be reversed, the Petitioners are suffering no cognizable injury as a result of the Bureau's action.<sup>13</sup> The opposition further contends that the Bureau staff could have reasonably concluded that public notices were not necessary in view of the *de facto* grants in *Algreg*.<sup>14</sup> Finally, the opposition states that while a pending pre-grant petition to deny restrains the FCC from issuing a license, a post-hearing petition to deny does not.<sup>15</sup>

7. Bravo also submitted an opposition on May 19, 1998. It too urged the issuance of a public notice, although it said that there was no statutory requirement compelling the issuance of one.<sup>16</sup> Turning to the merits, Bravo argued that the applicants failed to demonstrate how they were injured by the Bureau's action in light of the fact that they would be permitted to participate in a future auction should the D.C. Circuit ultimately overturn the Commission's order in *Algreg*.<sup>17</sup> Bravo agrees with Centaur and EJM that the filing of two petitions for reconsideration did not prevent the Commission from granting authorizations to the above parties.<sup>18</sup>

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<sup>9</sup> *Id.* at 4.

<sup>10</sup> *Id.* at 5-6.

<sup>11</sup> *Id.* at 8.

<sup>12</sup> Request for Public Notice of Grants and Opposition to Request for Rescission of Authorizations ("Opposition") at 2.

<sup>13</sup> *Id.* at 4.

<sup>14</sup> *Id.* at 5.

<sup>15</sup> *Id.* at 6.

<sup>16</sup> Opposition to Request for Rescission of Authorizations ("Bravo Opposition") at 3.

<sup>17</sup> *Id.* at 4, 6.

<sup>18</sup> *Id.* at 4.

8. In their reply, Petitioners reiterate that the Bureau could not have issued authorizations under the then circumstances and that Bravo, Centaur and EJM were really seeking special temporary operating authority.<sup>19</sup> They argue that the Commission must actually grant an application before it issues an authorization to operate a radio facility<sup>20</sup> and repeat their previous contention that the Commission must rule on the pending petitions for reconsideration before the Bureau can grant the applications.<sup>21</sup> Finally, Petitioners argue that they have standing because the Bureau's action has effectively dismissed their applications.

9. We agree with Petitioners that the Commission's June 3, 1997 order in *Algreg* did not grant the four applications in question. Rather, the Commission specifically remanded those applications to the Bureau with instructions to obtain additional information and then, if that information resolved the outstanding ownership questions, to grant them on an expedited basis.<sup>22</sup> Thus, the authorizations indicating that the Bureau granted the four applications on June 3, 1997, were in error. The Commission corrected that error by issuing a Public Notice on November 27, 1998, clarifying the dates the applications were actually granted.<sup>23</sup>

10. We disagree with Petitioners' contention that two pending petitions for reconsideration prohibit the granting of the four applications and subsequent authorizations. It is true that the filing of a petition to deny bars the granting of applications pending resolution of that petition. However, a pending petition for reconsideration does not preclude the Commission from granting an application.<sup>24</sup> Section 106(n) specifically states that absent a stay or other Commission action, the mere filing of a petition for reconsideration does not prevent an order from taking effect. Thus, the pending petitions for reconsideration in *Algreg* did not prevent the Bureau from issuing the four authorizations.

11. Finally, we deny Pending Petitioners' Petition for Reconsideration. The petition claims to be seeking reconsideration of the grant of the above applications as reflected in the Public Notice of November 27, 1998.<sup>25</sup> In fact, the Public Notice did not grant the above applications but merely clarified the date on

<sup>19</sup> Reply to Oppositions to Request for Rescission of Authorizations ("Reply") at 3.

<sup>20</sup> *Id.* at 3.

<sup>21</sup> *Id.* at 4.

<sup>22</sup> 12 FCC Rcd at 8189, ¶ 100.

<sup>23</sup> See *Public Notice*, Report No. CWS-99-9, released November 27, 1998. The Commission reissued the authorizations with the grant dates below:

<u>File Number</u>	<u>Callsign</u>	<u>Market</u>	<u>Applicant</u>	<u>Grant Dates</u>
10116-CL-P1-89	KNKQ449	721A	EJM	10/21/97
10567-CL-P1-89	KNKQ447	596A	EJM	10/21/97
10673-CL-P1-89	KNKQ443	576A	Bravo	11/6/97
10720-CL-P1-89	KNKQ453	631A	Centaur	1/7/98

<sup>24</sup> See, 47 C.F.R. § 1.106 (n). In *Open Media Corporation*, 8 FCC Rcd 4070,4072 ¶ 11 (1993), the filing of a petition for reconsideration did not preclude the issuance of a grant. Rather, the applicant simply proceeds at its own risk.

<sup>25</sup> Petition at 1.

which the Bureau granted those applications.

#### IV. Conclusion

12. The Commission's June 3, 1997 Order in *Algreg* did not grant the four applications in question and the Bureau acted improperly by indicating a June 3, 1997 grant date for the above four applications. However, the Public Notice of November 27, 1998 corrected that error. The pending reconsideration petitions do not prevent us from granting the above applications and issuing subsequent authorizations. We also deny Pending Petitioners' Petition for Reconsideration of the November 27, 1998 Public Notice and dismiss the applicants' Motion to Strike So-Called Statement for the Record as moot.

#### V. Ordering Clauses

13. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i) of the Communications Act of 1934 as amended, 47 U.S.C. § 154(i), and Sections 0.331 and 1.41 of the Commission's rules, 47 C.F.R. §§ 0.331 and 1.41, the Request for Rescission of Authorizations filed by Castle Trust, Orbit Cellular, RSA Cellular Partners, Schuylkill Mobile Fone, Inc., B. Scott Reardon III, Skyline Cellular Partners, Sunrise Trust, and Walker Trust on May 6, 1998, IS DENIED.

14. IT IS FURTHER ORDERED THAT, pursuant to Section 4(i) of the Communications Act of 1934 as amended, 47 U.S.C. § 154(i), and Sections 0.331 and 1.106 of the Commission's rules, 47 C.F.R. §§ 0.331 and 1.106, the Petition for Reconsideration filed by Castle Trust, Orbit Cellular, RSA Cellular Partners, Schuylkill Mobile Fone, Inc., B. Scott Reardon III, Skyline Cellular Partners, Sunrise Trust, Walker Trust, and Turnpike Cellular Partners on December 28, 1998, IS DENIED

15. IT IS FURTHER ORDERED THAT, pursuant to section 4(i) of the Communications Act of 1934 as amended, 47 U.S.C. § 154(i), the Motion to Strike So Called Statement for the Record, filed by Bravo Cellular, LLC, Centaur Partnership, and EJM Cellular Partners on July 22, 1998, IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

William W. Kunze  
Deputy Chief,  
Commercial Wireless Division  
Wireless Telecommunications Bureau